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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 377

OYSTER SHELL PRODUCTS CORPORATION, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW.

The opinion of the Court below was issued on July 24th, 1952. It is reported in 197 FED. (2nd) 1022 and appears in the transcript of record at page 92.

The opinion of the District Court below was issued on September 12, 1951. It is reported in 100 F. SUPP., 378 and appears in the transcript of record at page 66.

JURISDICTION.

Judgment was entered in the present case on July 24, 1952. No application was made for rehearing. This petition is presented within ninety (90) days from the entry of judgment.

Jurisdiction is invoked under Section 1254 of the Judicial Code, 28 U.S.C.A. 1254.

LAW INVOLVED.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

"* * *; nor shall private property be taken for public use, without just compensation."

STATUTES OF THE UNITED STATES.

33 U.S.C. 702. MISSISSIPPI RIVER.

33 U.S.C. 702a. SAME; ADOPTION OF 1926 PROJECT; EXECUTION; CREATION OF BOARD; SCOPE OF AUTHORITY; APPROPRIATION.

33 U.S.C. 702a-1. SAME; MODIFICATION OF PROJECT OF 1927; ADOPTION; et seq.

33 U.S.C. 702c-2. ACQUISITION AND SALE OF LAND.

33 U.S.C. 594. WHEN IMMEDIATE POSSESSION OF LAND MAY BE TAKEN.

33 U.S.C. 595. CONSIDERATION OF BENEFITS IN ASSESSING COMPENSATION.

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LOUISIANA CODE OF PRACTICE; ART. 375, AS AMENDED BY ACT NUMBER 50 OF 1886; **DEMAND IN RECOVENTION—REQUISITES—NONRESIDENTS—DAMAGES.**

LOUISIANA CODE OF PRACTICE; ART. 377, AS ORIGINALLY ADOPTED ACT NUMBER 98 OF 1870. **PLEADING RECONVENTION—ANSWER OF ORIGINAL PLAINTIFF.**

QUESTIONS PRESENTED.

(1). Whether, under the Flood Control Statutes governing these proceedings, when the United States has taken and appropriated all of petitioner's property by damming it into the channel of the Atchafalaya Floodway, but has described only a small portion thereof in a petition for condemnation, the Court is bound to hold that what is described in the petition is all that has been taken and, therefore, is the maximum that petitioner may recover pursuant to the *Fifth Amendment to the Constitution?*

(2). Whether petitioner, under the *Flood Control Acts* governing these proceedings, may, in an answer, a reconventional demand, a counterclaim or a pleading by any other name, supply a complete description of all of its property taken and dammed into the channel of the Atchafalaya Floodway and pray for the just compensation therefor, pursuant to the

requirements of the *Fifth Amendment to the Constitution*, when less than that taken and appropriated is described in a petition for condemnation filed by the United States?

(3). Whether, under the *Flood Control Acts* governing these proceedings, the provisions of *ARTICLES 375 and 377 of the Louisiana Code of Practice* governing reconventional demands (counterclaims), are one of the "modes of proceedings" which, by the provisions of *33 U.S.C., SEC. 702d*, are made compulsory upon the Courts of the United States in Louisiana?

(4). Whether, under the *Flood Control Acts* governing these proceedings, a District Court in Louisiana has jurisdiction over a counterclaim filed by an owner of property taken by the United States in response to a petition for condemnation filed by the United States, supplying a description of all of the property taken but not described in the petition, and praying for the just compensation therefor guaranteed by the *Fifth Amendment to the Constitution?*

(5). Whether, when the United States has taken all of petitioner's property, making it part and parcel of the Atchafalaya Floodway under the *Flood Control Acts* governing these proceedings by damming it into the channel of the floodway, but described only a small part or portion thereof in a petition for condemnation and, in response thereto, petitioner

has filed a counter-claim with its answer, supplying a full and complete description of all of its property actually taken, but omitted from the petition, and praying for just compensation therefor under the *Fifth Amendment to the Constitution*, the action becomes one to collect a claim by the owner against the United States, or whether it is an adversary proceeding instituted by the United States against the owner of the property to take it from the owner and whether the owner is a plaintiff prosecuting a claim or a defendant resisting a proceeding to deprive it of what belongs to it until a condition precedent is fulfilled, that of just compensation therefor under the *Fifth Amendment to the Constitution?*

STATEMENT OF THE CASE.

Petitioner is engaged in the business of converting oyster shells into feeds, fertilizers, fillers, road material, railroad ballast and a variety of technical materials and, in connection with this business, owns a tract of land on the west bank of the Atchafalaya River adjacent to the town of Berwick, St. Mary Parish, Louisiana, on which is located manufacturing plants and fixtures, warehouses, docks, wharves, conveyor system, switch tracks, sidings, roadways and appurtenances thereto.

Petitioner, also, in connection with said business and as part and parcel thereof, operates on the East bank of the Atchafalaya River, adjacent to the town of Morgan City, St. Mary Parish, Louisiana, almost directly across the River from its Berwick Plant, another manufacturing

establishment, comprised of plant buildings, fixtures, warehouses, docks, wharves, conveyor system, switch tracks, sidings, roadways and appurtenances, upon lands which petitioner leases for long terms from the town of Morgan City, Morgan's Louisiana and Texas Railroad and Steamship Company and some individual owners. (TR. 34).

All of the foregoing described property of petitioner is located **below KROTZ SPRINGS, LOUISIANA,** on the East and West banks of the Atchafalaya River and **above the** Gulf of Mexico and **is not** subject to frequent overflow. (TR. 39, RES. EX. A).

The United States is engaged, under the *Federal Flood Control Acts*, in the construction of a floodway in the basin of the Atchafalaya River known as the Morganza Floodway, which has for its purpose the intentional flooding of the Atchafalaya Basin **from KROTZ SPRINGS to the GULF OF MEXICO by diverting into the Atchafalaya Basin waters from the Mississippi River.** (TR. 2 & 3 & 38 & 39).

In the construction of this floodway levees have been and are being built landward of petitioner's properties on both the (Berwick) West Bank and the (Morgan City) East Bank of the River so that all of petitioner's properties have been dammed into the channel and have become a part of the bed and the bottom of the floodway. (TR. 39, RES. EX. A; TR. 44, RES. EX. 1-5; TR. 45, RES. EX. 7-12).

On August 28th, 1950, the United States District Engineer at New Orleans wrote petitioner, informing it

that the location of the remaining items of levee construction in the vicinity had been determined and that the alignment would be landward of petitioner's Morgan City plant; that as soon as the fair market value of an easement over petitioner's property in this location could be arrived at that petitioner would be contacted with a view towards acquisition by the United States of the necessary rights. (TR. 51, RES. EX. 23; ALSO TR. pp. 51-52, RES. EX. 19-22).

On or about September 5th, 1950, the United States entered upon petitioner's land on the (Berwick) West Bank of the Atchafalaya River and began the construction of levees thereon landward of petitioner's plants and properties. (TR. p. 35).

On October 5th, 1950, one month later, the United States filed a petition in the United States District Court for the Eastern District of Louisiana at New Orleans, to condemn judicially only enough property belonging to petitioner on the (Berwick) West Bank of the River landward of petitioner's plants upon which to build and construct the levees begun on September 5th, 1950, one month before filing the petition, (TR. 2), and at the same time obtained an order of Court allowing it to take possession thereof. (SUP. TR. p. 4).

The petition omitted a description of the balance of petitioner's properties located on the (Berwick) West bank of the River between the levee site and the River, and omitted a description of all of petitioner's properties located on the (Morgan City) East bank of the River between the levee site and the River.

In response to the petition, petitioner filed an answer (Tr. 34) and a reconventional demand, (counter claim) (Tr. 38), describing all of its property actually taken by the United States in the construction of the Floodway, which had been omitted from the petition for condemnation and praying for the fair value thereof under the *Fifth Amendment to the Constitution.*

The United States filed a motion to dismiss the counter-claim and strike from the answer the claim for the value of petitioner's property located on the land described in the petition for condemnation. (TR. 60).

The District Court entered a judgment on September 14, 1951, dismissing the counter-claim and over-ruling the motion to strike. (TR. 68).

The District Court decided the motion to dismiss on the ground that the counter-claim sets up a claim against the United States, in a manner and in a Court in which the United States has not consented to be sued. (TR. 66).

The Court of Appeals for the Fifth Circuit sustained the District Court by saying:

> "We are in agreement with the views of the District Court and do not consider it necessary to expand upon its opinion." (TR. 93).

The District Court and the Court of Appeals failed to decide the issues raised by petitioner in support of its counter-claim and in support of the jurisdiction of the District Court thereof.

Instead the District Court decided the case and the Court of Appeals sustained the decision on the erroneous application of that line of Federal jurisprudence to the effect that, generally, absence of its specific statutory consent the United States cannot be sued either by direct action or by counter-claim.

REASONS FOR WHICH THE WRIT OF CERTIORARI SHOULD BE GRANTED.

I.

The Court below has decided an important question of Federal law in this cause which has not been, but which should be decided by this Honorable Court.

This is a condemnation proceeding brought by the United States against petitioner under the *Federal Flood Control Acts.* The petition contains a description of only a very small part of the property actually taken from petitioner (TR. pp. 3-5) by the United States in the construction of the Atchafalaya Floodway, all of which was dammed into the channel and became a part of the bed and the bottom of the Floodway itself.

Petitioner, in its defensive pleading which it called a counter-claim, supplied a description of all of its property so taken (TR. pp. 39-46), praying for its just compensation, which petitioner establishes at the aggregate sum of $3,150,000.00, (TR. pp. 56-58; TR. pp. 44-45, EX. 5 & 6), guaranteed by the *Fifth Amendment to the Constitution* of the United States.

The Court below held that the District Court was without jurisdiction to entertain the counter-claim, not-

withstanding the provisions of the *Federal Flood Control Acts* and the facts and circumstances peculiar to the "taking" of petitioner's property in this case.

That the Congress recognized that a proceeding such as this was to be a controversial one instituted by the United States to be contested as to what has been taken and the value of the property involved, as well as the compensation to be paid therefor, and, as well, for the damages inflicted, is demonstrated by the provisions of the statutes under which the taking and this action is authorized, the terms of which make it perfectly plain and clear that Congress has specifically authorized any defendant in such a proceeding to demand of the Government and to have judgment for the just and fair value of that which the Government has taken and the damages it has wrought, whether the claim be called a cross-claim, an answer or a defensive pleading by any other name. Such Statutes also designate the United States District Court for the District in which the land, easement or right of way is located as the Court of appropriate jurisdiction before which actions and cross-actions such as this are to be brought, heard and determined.

Such *Statutes*, in part, provide:

"THE UNITED STATES MAY, WITHIN THE DISCRETION OF THE CHIEF OF ENGINEERS, **IRRESPECTIVE OF OTHER PROVISIONS OF LAW PROCEED TO ACQUIRE, ALL EASEMENTS NEEDED AND OF THE CHARACTER CONSIDERED ADVISABLE,** IN THE MORGANZA FLOODWAY AND TO CONSTRUCT SAID MORGANZA FLOODWAY * * *."

"* * * that the CHIEF OF ENGINEERS IS AUTHORIZED IN HIS DISCRETION **TO NEGOTIATE OPTIONS, MAKE AGREEMENTS AND OFFERS** WITH RESPECT TO LANDS, FLOWAGE RIGHTS, EASEMENTS And RIGHTS OF WAY INVOLVED AS PROVIDED BY LAW AT PRICES DEEMED REASONABLE TO HIM."

"THE UNITED STATES, **IRRESPECTIVE OF OTHER PROVISIONS OF LAW,** MAY WITHIN THE DISCRETION OF THE CHIEF OF ENGINEERS ACQUIRE FLOWAGE EASEMENTS OVER **ALL LANDS NOT SUBJECT TO FREQUENT OVERFLOW IN THE ATCHAFALAYA BASIN BELOW** THE LATITUDE OF KROTZ SPRINGS."

"THE UNITED STATES MAY, IN THE DISCRETION OF THE CHIEF OF ENGINEERS, ACQUIRE ALL FLOWAGE RIGHTS, FLOWAGE EASEMENTS, RIGHTS OF WAY FOR LEVEE FOUNDATIONS AND TITLES IN FEE SIMPLE AS HEREIN PROVIDED EITHER BY VOLUNTARY ACQUISITION **OR** IN ACCORDANCE WITH THE CONDEMNATION PROCEEDINGS BY THE SECRETARY OF THE ARMY AS PROVIDED FOR IN **SECTION 702d** OF THIS TITLE."

33 U. S. C. A. Sec. 702a-11.

"THE UNITED STATES SHALL PROVIDE FLOWAGE RIGHTS FOR ADDITIONAL DESTRUCTIVE FLOOD WATERS THAT WILL PASS BY REASON OF DIVERSION FROM THE

MAIN CHANNEL OF THE MISSISSIPPI RIVER, PROVIDED THAT IN ALL CASES WHERE THE EXECUTION OF THE FLOOD CONTROL PLAN HEREIN ADOPTED RESULTS IN BENEFITS TO PROPERTY SUCH BENEFITS SHALL BE TAKEN INTO CONSIDERATION BY WAY OF REDUCING THE AMOUNT OF COMPENSATION TO BE PAID."

"THE SECRETARY OF THE ARMY MAY CAUSE PROCEEDINGS TO BE INSTITUTED FOR THE ACQUIREMENT BY CONDEMNATION OF ANY LANDS, EASEMENTS, OR RIGHTS OF WAY WHICH IN THE OPINION OF THE SECRETARY OF THE ARMY AND THE CHIEF OF ENGINEERS ARE NEEDED IN CARRYING OUT THIS PROJECT, **THE SAID PROCEEDINGS TO BE INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT IN WHICH THE LAND, EASEMENT OR RIGHT OF WAY IS LOCATED.** IN ALL SUCH PROCEEDINGS THE PRACTICE, PLEADINGS, FORMS AND MODES OF PROCEEDINGS SHALL CONFORM AS NEAR AS MAY BE TO THE PRACTICE, PLEADINGS, FORMS AND PROCEEDINGS EXISTING AT THE TIME IN LIKE CAUSES IN THE COURTS OF RECORD OF THE STATE WITHIN WHICH SUCH DISTRICT COURT IS HELD, ANY RULE OF COURT TO THE CONTRARY NOTWITHSTANDING. * * *."

"* * * THE PROVISIONS OF SECTIONS 594 AND 595 OF THIS TITLE ARE MADE AP-

PLICABLE TO THE ACQUISITION OF LANDS, EASEMENTS, OR RIGHTS OF WAY NEEDED FOR WORK ON FLOOD CONTROL; * * *."
33 U. S. C. A. 702d.

"WHENEVER THE SECRETARY OF WAR IN PURSUANCE OF AUTHORITY CONFERRED ON HIM BY LAW, CAUSES PROCEEDINGS TO BE INSTITUTED IN THE NAME OF THE UNITED STATES FOR THE ACQUIREMENT BY CONDEMNATION OF ANY LANDS, EASEMENTS, OR RIGHTS OF WAY NEEDED FOR A WORK OF RIVER AND HARBOR IMPROVEMENTS DULY AUTHORIZED BY CONGRESS **THE UNITED STATES UPON THE FILING OF THE PETITION IN ANY SUCH PROCEEDINGS SHALL HAVE THE RIGHT TO TAKE IMMEDIATE POSSESSION OF SUCH LANDS, EASEMENTS, OR RIGHTS OF WAY TO THE EXTENT OF THE INTEREST TO BE ACQUIRED AND PROCEED WITH SUCH PUBLIC WORKS THEREON AS HAVE BEEN AUTHORIZED BY CONGRESS; PROVIDED THAT CERTAIN AND ADEQUATE PROVISION SHALL HAVE BEEN MADE FOR THE PAYMENT OF JUST COMPENSATION TO THE PARTY OR PARTIES ENTITLED THERETO,** EITHER BY PREVIOUS APPROPRIATION BY THE UNITED STATES OR BY THE DEPOSITS OF MONEYS OR OTHER FORM OF SECURITY IN SUCH AMOUNT AND FORM AS SHALL BE APPROVED BY THE COURT IN WHICH SUCH PROCEEDINGS SHALL BE INSTITUTED. **THE**

RESPONDENT OR RESPONDENTS MAY MOVE AT ANY TIME IN THE COURT TO INCREASE OR CHANGE THE AMOUNTS OR SECURITIES AND THE COURT SHALL MAKE SUCH ORDER OR ORDERS AS SHALL BE JUST IN THE PREMISES AND SHALL ADEQUATELY PROTECT THE RESPONDENTS. IN EVERY CASE THE PROCEEDINGS IN CONDEMNATION SHALL BE DILIGENTLY PROSECUTED ON THE PART OF THE UNITED STATES IN ORDER THAT SUCH COMPENSATION MAY BE PROMPTLY ASCERTAINED AND PAID." *33 U. S. C. A. SEC. 594.*

"IN ALL CASES WHERE PRIVATE PROPERTY SHALL BE TAKEN BY THE UNITED STATES FOR PUBLIC USE IN CONNECTION WITH ANY IMPROVEMENT OF RIVERS, HARBORS, CANALS OR WATERWAYS OF THE UNITED STATES, **AND IN ALL CONDEMNATION PROCEEDINGS BY THE UNITED STATES TO ACQUIRE LANDS OR EASEMENTS** FOR SUCH IMPROVEMENTS WHERE A PART ONLY OF ANY SUCH PARCEL, LOT OR TRACT OF LAND SHALL BE TAKEN THE JURY OR OTHER TRIBUNAL **AWARDING THE JUST COMPENSATION OR ASSESSING THE DAMAGES TO THE OWNER WHETHER FOR THE VALUE OF THE PART TAKEN OR FOR ANY INJURY TO THE PART NOT TAKEN** SHALL TAKE INTO CONSIDERATION BY WAY OF REDUCING THE AMOUNT OF **COMPENSATION OR DAMAGES** ANY SPECIAL AND DI-

RECT BENEFITS TO THE REMAINDER ARISING FROM THE IMPROVEMENTS AND SHALL RENDER THEIR **AWARD** OR **VERDICT** ACCORDINGLY."

33 U. S. C. A. SEC. 595.

In order to further emphasize its intent for a Defendant in a proceeding such as this to contest the issues involved with the Government controversially and contradictorily the Congress particularly and specifically provided as a part of the Act governing these proceedings the following:

"IN ALL SUCH PROCEEDINGS, THE PRACTICES, PLEADINGS, FORMS AND MODES OF PROCEEDINGS SHALL CONFORM AS NEAR AS MAY BE TO THE PRACTICE, PLEADINGS, FORMS AND PROCEEDINGS EXISTING AT THE TIME IN LIKE CAUSES IN THE COURTS OF RECORD OF THE STATE WITHIN WHICH SUCH DISTRICT COURT IS HELD, ANY RULE OF COURT TO THE CONTRARY NOTWITHSTANDING."

33 U. S. C. A. SEC. 702d.

There should have been included in the petition a complete description of all of the property belonging to petitioner described in its counter-claim, included and embraced in the actual "taking" in the construction of the Floodway. Such was the contemplation of the *Act*. Failure on the part of the United States to so describe all of petitioner's property "taken" gave rise to the right of petitioner under the specific intent of the *Statute* to sup-

ply the omission and make demand for the value of it, pursuant to the mandate of the *Fifth Amendment.*

Louisiana Code of Practice, Article 375 (see Appendix);

Louisiana Code of Practice, Article 377 (see Appendix).

Congress was fully aware that in the enactment of these Statutes a defendant could not be protected under the *Fifth Amendment* unless it was before the Court and could be heard, whether the Goverment sought to suppress his voice, on the technical objection that his pleading was a counter-claim and that on a counter-claim the government could not be sued, or by some other technical device.

(SYL.) "THE COMMON LAW RULE THAT STATUTORY POWERS TO CONDEMN SHOULD BE GIVEN A RESTRICTIVE INTERPRETATION IS INAPPLICABLE WHERE THE STATUTE EXPRESSLY PROVIDES THAT IT SHALL BE LIBERALLY CONSTRUED TO CARRY OUT THE PURPOSE OF THE LEGISLATURE."

(1946). UNITED STATES ex rel TENNESSEE VALLEY AUTHORITY v. WELCH, 327 U. S. 546, 90 L. ED. 843.

The *Flood Control Statutes* under which this action is depending provide:

"NOTWITHSTANDING OTHER PROVISIONS OF LAW."

This Honorable Court of the United States, in the *WELCH* case, *90 L. ED. 843, supra*, held:

(SYL.) "THE POWERS GRANTED BY CONGRESS TO THE TENNESSEE VALLEY AUTHORITY (16 U. S. C. SEC. 831) TO 'EXERCISE THE RIGHT OF EMINENT DOMAIN' TO CONDEMN 'ALL PROPERTY THAT IT DEEMS NECESSARY FOR CARRYING OUT THE PURPOSE OF THIS ACT' AND TO FILE CONDEMNATION PROCEEDINGS 'FOR THE ACQUISITION BY CONDEMNATION OF ANY LANDS, EASEMENTS, OR RIGHTS OF WAY WHICH IN THE OPINION OF THE CORPORATION ARE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ACT' INCLUDES THE POWER TO CONDEMN PROPERTY FOR THE PURPOSE OF SETTLING ITS LIABILITY FOR THE DESTRUCTION OF A STATE HIGHWAY BY FLOODING UNDER AN AGREEMENT BETWEEN IT AND THE STATE, THE COUNTY AND THE NATIONAL PARK SERVICE WITH A VIEW TO COOPERATION WITH THE OTHER GOVERNMENTAL AGENCIES AND THE PREVENTION OF THE WASTE OF GOVERNMENT FUNDS THROUGH ADJUSTMENTS MADE IN THE INTEREST OF ALL THE PUBLIC ALTHOUGH THE PROPERTY TAKEN IS NOT DIRECTLY NEEDED BY IT FOR ITS DAM AND RESERVOIR."

The powers conferred on the Chief of Engineers and the Secretary of the Army by the *Flood Control Stat-*

utes governing the case at Bar are as fully, freely and liberally delegated as were the powers conferred upon the Tennessee Valley Authority.

This Honorable Court of the United States in *BROWN v. UNITED STATES, 263 U. S. 78, 68 L. ED. 171, 44 S. Ct. 92*, said:

> "WHEN SERIOUS PROBLEMS ARE CREATED BY ITS PUBLIC PROJECTS THE GOVERNMENT IS NOT BARRED FROM MAKING A COMMON SENSE ADJUSTMENT IN THE INTEREST OF ALL THE PUBLIC."

The cross-claim in the case at Bar is of no greater value than the property and property rights taken from Defendant as a result of which the claim arises and, therefore, defendant is entitled to obtain this value in these proceedings.

As it is argued that because the complaint in condemnation did not include a description of all of the property and property rights belonging to defendant and that only the property described in the complaint may be subject matter of this action, notwithstanding that the properties have been taken, whether described in the Bill of Complaint or not, it is represented that where such descriptions are brought to the notice of the Court, whether in the allegations of the answer or in the allegations of the counter-claim the Court has jurisdiction thereof to the same extent as if such descriptions had been embodied originally in the Bill of Complaint.

In a proceeding under the *TUCKER ACT* where suits were based upon the right to recover just compensa-

tion for property taken by the United States for public use in the exercise of its power of eminent domain this Honorable Court held:

> "THE FACT THAT CONDEMNATION PROCEEDINGS WERE NOT INSTITUTED AND THAT THE RIGHTS WERE ASSERTED IN SUITS BY THE OWNERS DID NOT CHANGE THE ESSENTIAL NATURE OF THE CLAIM. THE FORM OF THE REMEDY DID NOT QUALIFY THE RIGHT. IT RESTED UPON THE FIFTH AMENDMENT. STATUTORY RECOGNITION WAS NOT NECESSARY. SUCH A PROMISE WAS IMPLIED BECAUSE OF THE DUTY TO PAY IMPOSED BY THE AMENDMENT. THE SUITS WERE THUS FOUNDED UPON THE CONSTITUTION OF THE UNITED STATES. U. S. C. TITLE 28 SECTION 41 (20)." *JACOBS v. UNITED STATES, 290 U S. 13, 54 S. CT. 26, 78 L. ED. 142.*

The *Flood Control Act (33 U. S. C. A. 702d)* under which the construction of the Morganza Spillway and the Atchafalaya Floodway are being constructed, and of which petitioner's properties, described in its counter-claim, (TR. 38-59) have been made and are now a part, provides:

> "**THE UNITED STATES SHALL PROVIDE FLOWAGE** RIGHTS FOR ADDITIONAL DESTRUCTIVE FLOOD WATERS THAT WILL PASS BY REASON OF DIVERSION FROM THE MAIN CHANNEL OF THE MISSISSIPPI RIVER: PROVIDED THAT IN ALL CASES WHERE THE EXECUTION OF THE FLOOD

CONTROL PLAN HEREIN ADOPTED RESULTS IN BENEFITS TO PROPERTY SUCH BENEFITS SHALL BE TAKEN INTO CONSIDERATION BY WAY OF REDUCING THE AMOUNT OF COMPENSATION TO BE PAID."

and provides further:

"THE SECRETARY OF THE ARMY MAY CAUSE PROCEEDINGS TO BE INSTITUTED FOR THE ACQUIREMENT BY CONDEMNATION OF ANY LANDS, EASEMENTS OR RIGHTS OF WAY WHICH IN THE OPINION OF THE SECRETARY OF THE ARMY AND THE CHIEF OF ENGINEERS, ARE NEEDED IN CARRYING OUT THIS PROJECT THE **SAID PROCEEDINGS TO BE INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT IN WHICH THE LAND, EASEMENT OR RIGHT OF WAY IS LOCATED.**

The act also provides *(33 U. S. C. A. SECTIONS 594 and 595)* for the mode of practice.

Therefore, the properties and property rights of petitioner having been located in that portion of the Floodway, of which they now are a part, situated in St. Mary Parish, Louisiana jurisdiction has been specifically conferred by *Statute* upon the District Court for the Eastern District of Louisiana wherein this proceeding was instituted by the United States.

The *Statute* conferred jurisdiction on the Court for all that the Government had done and was doing to

all of petitioner's property, **the moment the United States invoked that jurisdiction by filing this suit** and the Government could not, after setting in motion the machinery to acquire such jurisdiction, limit or restrain that jurisdiction to affect but a trivial portion of petitioner's property through the ingenuity of technical pleading.

Pleading under these special statutes is not an *ex parte* matter. While the petitioner may not have brought an original action in the District Court, nevertheless, since the Government, itself, opened the door by instituting this suit, it must open the door all the way. The Court must hear the whole story from both the plaintiff and the defendant - - - not just the piece-meal part of the story plaintiff seeks to present in its petition.

That provision of the *Statute* authorizing the Secretary of the Army to:

> "CAUSE PROCEEDINGS TO BE INSTITUTED FOR THE ACQUIREMENT BY CONDEMNATION OF ANY LANDS, EASEMENTS OR RIGHTS OF WAY WHICH IN THE OPINION OF THE SECRETARY OF THE ARMY AND THE CHIEF OF ENGINEERS ARE NEEDED IN CARRYING OUT THIS PROJECT * * *"

means and can only mean that all of the property actually taken shall be described in the condemnation proceedings.

In other words, the mandate of the Statute is that **the opinion of the Secretary and the Chief of Engineers may be indulged as to what they shall take, but they may not indulge opinion as to what they shall describe in a**

petition for condemnation when that description is something less than that they have taken. If the description is something less than a description of that actually taken then it is submitted that under the express intent of the Statute the Court has jurisdiction over a pleading of a defendant supplying a complete description of that deficiency.

On September 5th, 1950, (TR. 15), more than thirty days before the United States filed its petition for condemnation in the District Court, the agents of the Government entered upon petitioner's properties for the purpose of progressively prosecuting its work under its statutory *Flood Control* program. **At that time the Government appropriated** all of the property and property rights of petitioner described in its counter-claim on both sides of the Atchafalaya River between the towns of Morgan City and Berwick, across the River from each other, insofar as the Statutes under which the work was being done are concerned, insofar as the established jurisprudence is concerned and insofar as the jurisdiction of the District Court for the Eastern District of Louisiana is concerned, with regard to both the parties hereto and the subject matter set out in petitioner's counter-claim in its entirety.

On August 28th, 1950, more than sixty days before any legal proceedings were instituted or judicial action attempted, the United States District Engineer at New Orleans wrote petitioner as follows:

"THE LOCATION OF THE REMAINING ITEMS OF LEVEE CONSTRUCTION IN THIS VICINITY HAVE NOW BEEN DETERMINED. THE

ALIGNMENT WILL BE LANDWARD OF YOUR MORGAN CITY PLANT. AT SUCH TIME AS DETERMINATION OF THE FAIR MARKET VALUE OF AN EASEMENT OVER YOUR PROPERTY IN THIS LOCATION HAS BEEN MADE I WILL WRITE YOU WITH A VIEW TOWARDS ACQUISITION OF THE NECESSARY RIGHTS BY THE UNITED STATES." (TR. 52—EXHIBIT NUMBER 23 ANNEXED TO COUNTER-CLAIM).

The hazard and the peril to petitioner's properties having, as a matter of fact, been established by overt acts of the accredited agents of the Government their legal destruction was accomplished and took place. These properties and property rights, as the Statute contemplated, should have been described in the petition for condemnation; not having been so described the jurisdiction of the Court over them could not be defeated for the defendant had the Statutory right to supply the description, whether by answer, counter-claim or a pleading by any other name, and, thereunder, to claim recovery for their value.

Such we submit is the plain intent of the Statute. On October 5th, 1950, when the United States filed its petition in this cause and obtained, as it did, the *ex parte* order of immediate possession of the small portion of real property described in the petition it then and there knowingly waived its immunity from suit and consented to be sued by defendant on its counter-claim under the express intent of the Statutes governing the construction of the Flood Control Project.

This Honorable Court has long since held:

(1932).

"IT MAY JUSTIFIABLY BE ASSUMED THAT THE ADOPTION BY CONGRESS OF A PLAN OF RIVER CONTROL WHICH INVOLVES AN INTENTIONAL ADDITIONAL OCCASIONAL FLOODING OF CERTAIN LANDS CONSTITUTES A TAKING THEREOF AS SOON AS THE GOVERNMENT BEGINS TO CARRY OUT THE PROJECT AUTHORIZED."

HURLEY v. KINCAID, 205 U. S. 95, 76 L. ED. 637.

(1920).

"WHEN THE GOVERNMENT, WITHOUT INSTITUTING CONDEMNATION PROCEEDINGS, APPROPRIATES FOR A PUBLIC USE UNDER LEGISLATIVE AUTHORITY PRIVATE PROPERTY TO WHICH IT ASSERTS NO TITLE IT IMPLIEDLY PROMISES TO PAY THEREFOR."

UNITED STATES v. NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, 253 U. S. 330, 44 L. ED. 935.

(1945).

"A TAKING WITHIN THE MEANING OF THE CONSTITUTIONAL PROVISION THAT PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION INCLUDES ANY ACTION THE

EFFECT OF WHICH IS TO DEPRIVE THE OWNER OF ALL OR MOST OF HIS INTEREST IN THE SUBJECT MATTER SUCH AS DESTROYING IT."

UNITED STATES v. GENERAL MOTORS CORPORATION, 323 U. S., 373, 89 L. ED. 311.

This Court said further:

"* * *".

"IF THE GOVERNMENT NEED ONLY PAY THE LONG TERM RENTAL FOR AN EMPTY BUILDING FOR A TEMPORARY TAKING FROM THE LONG TERM TENANT A WAY WILL HAVE BEEN FOUND TO DEFEAT THE FIFTH AMENDMENT'S MANDATE FOR JUST COMPENSATION IN ALL CONDEMNATIONS EXCEPT THOSE IN WHICH THE CONTEMPLATED PUBLIC USE REQUIRES THE TAKING OF THE FEE SIMPLE TITLE. IN ANY CASE WHERE THE GOVERNMENT MAY NEED PRIVATE PROPERTY, IT CAN DEVISE ITS CONDEMNATION SO AS TO SPECIFY A TERM OF A DAY, A MONTH, OR A YEAR WITH OPTIONAL CONTINGENT RENEWAL FOR INDEFINITE PERIODS, AND WITH THE CERTAINTY THAT IT NEED PAY THE OWNER ONLY THE LONG TERM RENTAL RATE OF AN UNOCCUPIED BUILDING FOR THE SHORT TERM PERIOD IF THE PREMISES ARE ALREADY UNDER LEASE OR, IF NOT, THEN A MARKET RENTAL FOR WHATEVER MINIMUM TERM IT MAY CHOOSE TO

SELECT, FIXED ACCORDING TO THE USUAL MODES OF ARRIVING AT RENTAL RATES. AND THIS, THOUGH THE OWNER MAY BE DAMAGED BY THE OUSTER, TEN, A SCORE, OR PERHAPS A HUNDRED TIMES THE AMOUNT DUE HIM AS 'FAIR RENTAL VALUE'. IN THE PRESENT CASE THE RESPONDENT OFFERED TO PROVE THAT THE ACTUAL EXPENSE OF MOVING ITS PROPERTY EXCEEDED $46,000, AND THE LOSS DUE TO DESTRUCTION AND REMOVAL OF FIXTURES AND FIXED EQUIPMENT EXCEEDED $31,000, IN ADDITION TO ITS CONTINUING LIABILITY TO PAY RENT FOR THE YEAR OF APPROXIMATELY $40,000; WHEREAS THE AWARD WAS $38,597.86. IF SUCH A RESULT BE SUSTAINED WE CAN SEE NO LIMIT TO UTILIZATION OF SUCH A DEVICE. AND IF THERE IS NONE, THE AMENDMENT'S GUARANTEE BECOMES NOT ONE OF JUST COMPENSATION FOR WHAT IS TAKEN BUT AN INSTRUMENT OF CONFISCATION, FICTIONALIZING 'JUST COMPENSATION' INTO SOME SUCH CONCEPT AS THE COMMON LAW IDEA OF PEPPER CORN IN THE LAW OF SEIZEN OR THE LATER ONE OF 'VALUE RECEIVED' IN THAT OF CONTRACTURAL CONSIDERATION. IF THE VALUE TO BE PAID IN A CASE LIKE THE PRESENT IS CONFINED, AS A MATTER OF LAW TO THE LONG TERM RENTAL OF BARE SPACE THE OWNER WILL NOT BE SECURE

EITHER IN HIS RIGHTS OF PROPERTY, OR IN HIS RIGHT TO JUST COMPENSATION AS A SUBSTITUTE FOR IT WHEN THE GOVERNMENT TAKES IT FOR THE USE AND BENEFIT OF ALL."

UNITED STATES v. GENERAL MOTORS CORPORATION, 323 U. S., 373, 89 L. ED. 311.

THE COURT HAS FOUND A TAKING WHEN THE GOVERNMENT DIRECTLY SUBJECTED LAND TO PERMANENT INTERMITTENT FLOODS TO AN OWNERS DAMAGE.

JACOBS v. U. S., 290 U. S. 13, 78 L. ED. 142. U. S. v. CRESS, 243 U. S. 316, 61 L. ED. 746. U. S. v. LYNAH, 188 U. S. 445, 47 L. ED. 539. PUMPELLY v. GREEN BAY & M. CANAL, 13 WALL. 166, 20 L. ED. 557. SANGUINETTI v. U. S., 264 U. S. 146, 68 L. ED. 608.

This Honorable Court holds, in a case where, among other issues, that of prescription arose:

"WHEN DEALING WITH A PROBLEM WHICH ARISES UNDER SUCH DIVERSE CIRCUMSTANCES PROCEDURAL RIGIDITIES SHOULD BE AVOIDED. ALL THAT WE ARE HERE HOLDING IS THAT WHEN THE GOVERNMENT CHOOSES NOT TO CONDEMN LAND BUT TO BRING ABOUT A TAKING BY A CONTINUING PROCESS OF PHYSICAL EVENTS, THE OWNER IS NOT REQUIRED TO RESORT EITHER TO PIECE-MEAL OR PREMATURE LITIGATION TO ASCERTAIN

THE JUST COMPENSATION FOR WHAT IS REALLY 'TAKEN'," and further,

"THE GOVERNMENT COULD, OF COURSE, HAVE TAKEN APPROPRIATE PROCEEDINGS TO CONDEMN AS EARLY AS IT CHOSE BOTH LAND AND FLOWAGE EASEMENTS. BY SUCH PROCEEDINGS IT COULD HAVE FIXED THE TIME WHEN THE PROPERTY WAS 'TAKEN'. THE GOVERNMENT CHOSE NOT TO DO SO. IT LEFT THE TAKING TO PHYSICAL EVENTS THEREBY PUTTING ON THE OWNER THE ONUS OF DETERMINING THE DECISIVE MOMENT IN THE PROCESS OF ACQUISITION BY THE UNITED STATES WHEN THE FACT OF TAKING COULD NO LONGER BE IN CONTROVERSY", and,

"PROPERTY IS TAKEN IN THE CONSTITUTIONAL SENSE WHEN INROADS ARE MADE UPON THE OWNER'S USE OF IT TO AN EXTENT THAT AS BETWEEN PRIVATE PARTIES, A SERVITUDE HAS BEEN ACQUIRED EITHER BY AGREEMENT OR IN THE COURSE OF TIME. THE FIFTH AMENDMENT EXPRESSES A PRINCIPLE OF FAIRNESS AND NOT A TECHNICAL RULE OF PROCEDURE ENSHRINING OLD OR NEW NICETIES REGARDING 'CAUSES OF ACTION' —WHEN THEY ARE BORN, WHETHER THEY PROLIFERATE AND WHEN THEY DIE'."

UNITED STATES v. WILLIAM M. DICKINSON, 331 U. S. 745, 91 L. ED. 1789.

The character of the case at Bar and its analogy falls into that category of jurisprudence enunciated in the *THEKLA*—not because in the case at Bar a counter-claim was filed upon the theory that by filing the suit the United States "so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter" **alone** but because the cause of action in the case at Bar and the cause of action in the *THEKLA* fall by analogy one each to the other in the self-same category, namely the "collision" in the *THEKLA* rather than the vessel was the subject matter and the "taking" in the case at Bar rather than the property is the subject matter. They are the same kind of a case involving the same principle of law and are exceptions to the general rule. The *THEKLA*, *United States v. Dickinson*, and *United States v. General Motors Corporation*, *supra*, when read inter-relatedly and in connection with each other, spell out the analogy of the case at Bar to the *THEKLA*. And when the provisions of the *Flood Control Acts* governing this proceeding are considered in their entirety in relation thereto the Court will, we submit, experience no great difficulty in finding in the *Statute* the specific authority for the jurisdiction of the District Court over the petitioner's counter-claim.

Under the Statutes the Court is required to find the value of the property taken from, and the amount of damages sustained by the private owner, then to find whether the private owner has obtained any benefits as a result of the taking, and, if so, to find the value of such benefits and to take the value of such benefits into con-

sideration in fixing the just compensation or in awarding the damages.

LUCKENBACH STEAMSHIP CO., INC., and *THE UNITED STATES OF AMERICA v. NORWEGIAN BARQUE THEKLA, HER TACKLE, etc., 266 U. S. 328, 69 L. Ed. 313.*

II.

The decision of the Court below is in conflict with *United States v. Sargent, 162 Fed. 83*, decided by the United States Court of Appeals for the Eighth Circuit.

In *UNITED STATES v. SARGENT, 162 FED. 83*, the United States Court of Appeals for the Eighth Circuit held:

"THERE IS A GREAT DIFFERENCE BETWEEN THE ASSERTION OF A CLAIM OR ACCOUNT AGAINST THE UNITED STATES BY A PERSON WHO POSSESSES IT AND A PROCEEDING OF THIS KIND INSTITUTED BY THE UNITED STATES. THIS PROCEEDING INSTEAD OF ONE TO COLLECT AN ACCOUNT OR CLAIM AGAINST THE UNITED STATES IS AN ADVERSARY PROCEEDING INSTITUTED BY THE UNITED STATES AGAINST OWNERS OF LAND TO TAKE IT FROM THEM. THE LAND OWNERS ARE NOT PLAINTIFFS PROSECUTING CLAIMS BUT DEFENDANTS RESISTING A PROCEEDING TO DEPRIVE THEM OF WHAT IS THEIRS UNTIL A CONDITION PRECEDENT IS FUL-

FILLED. MASON CITY R. R. v. BOYNTON, 204 U. S. 570, 27 SUP. CT. 321, 51 L. ED. 629. THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN IS A PREROGATIVE OF SOVEREIGNTY IN THIS COUNTRY, BUT IT IS SUBJECT TO THE CONDITION IMPOSED BY THE CONSTITUTION OF PAYING 'JUST COMPENSATION THEREFOR'."

In the foregoing case demand was made by the defendant for interest on the award made by the commissioners from the date of the filing of their report until the date when payment of the damages should be made. The demand was resisted.

The Court said:

"IT IS WELL SETTLED THAT, IN THE ABSENCE OF A STIPULATION TO PAY INTEREST OR A STATUTE ALLOWING INTEREST THAT NONE CAN BE RECOVERED AGAINST THE UNITED STATES UPON UNPAID ACCOUNTS OR CLAIMS. * * * IT IS UPON OR IN ANALOGY WITH THIS PRINCIPLE THAT THE UNITED STATES CONTENDS THAT INTEREST UPON THE AMOUNT OF THE AWARD IN THIS CASE SHOULD NOT HAVE BEEN ALLOWED. WE ARE UNABLE TO AGREE WITH THIS CONTENTION."

It is urged that the amendment of *RULE 81 (a)* and the adoption of *Rule 71A of the Rules of Civil Procedure* for the District Courts are inapplicable in this

cause for the proceedings herein were and are governed by the Statutory provisions under which they were brought and conducted and are to be governed as a matter of effect and as a result of what the *Statute* required to be done before the effective date of the amendment of *Rule 81 (a)* and the adoption of *Rule 71A*.

CONCLUSION.

WHEREFORE, it is submitted that this Honorable Court should grant a writ of certiorari to the Court of Appeals for the Fifth Circuit and that the judgment of the Court below be reversed.

(Emphasis throughout ours).

Respectfully submitted,

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APPENDIX.

LOUISIANA CODE OF PRACTICE, ARTICLE 375; ACT No. 50, LOUISIANA LEGISLATURE OF 1886.

"DEMAND IN RECONVENTION — REQUISITES — NON-RESIDENTS — DAMAGES.

IN ORDER TO ENTITLE THE DEFENDANT TO INSTITUTE A DEMAND IN RECONVENTION IT IS REQUIRED THAT SUCH A DEMAND THOUGH DIFFERENT FROM THE MAIN ACTION, BE NEVERTHELESS NECESSARILY CONNECTED WITH AND INCIDENTAL TO THE SAME, AS FOR INSTANCE THE DEMAND INSTITUTED BY THE POSSESSOR IN GOOD FAITH AGAINST HIM WHO SUES IN ORDER TO EVICT HIM OR FOR THE PURPOSE OF OBTAINING THE PAYMENT OF THE IMPROVEMENTS MADE ON THE PREMISES. * * *."

LOUISIANA CODE OF PRACTICE, ARTICLE 377; ACT No. 98, LOUISIANA LEGISLATURE OF 1870.

"PLEADING RECONVENTION—ANSWER OF ORIGINAL PLAINTIFF.

IN ALL CASES OF RECONVENTION THE DEFENDANT MAY PLEAD IT EITHER AS AN EXCEPTION IN HIS ANSWER TO THE PRIN-

CIPAL DEMAND OR INSTITUTE A DISTINCT AND SEPARATE DEMAND BEFORE THE COURT IN WHICH THE MAIN ACTION IS PENDING AND THE ORIGINAL PLAINTIFF SHALL BE BOUND TO ANSWER WITHOUT PLEADING TO THE JURISDICTION OF THE COURT EVEN IF HE HAS HIS DOMICILE ELSEWHERE PROVIDED THE COURT BE COMPETENT."

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